

IN THE SUPREME COURT OF MISSOURI

MINACT, INC.,

Respondent (Petitioner below),

vs.

DIRECTOR OF REVENUE,

Appellant (Respondent below).

**From the Administrative Hearing Commission of Missouri
The Honorable Sreenivasa Rao Dandamudi, Commissioner**

REPLY BRIEF OF APPELLANT

**CHRIS KOSTER
Attorney General**

**JEREMIAH J. MORGAN
Mo. Bar No. 50387
Deputy Solicitor General
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321
(573) 751-0774 (Facsimile)
Jeremiah.Morgan@ago.mo.gov**

**ATTORNEYS FOR APPELLANT
DIRECTOR OF REVENUE**

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ARGUMENT

Minact, Inc. pays taxes on all of its Trust income. That is not in dispute. *See* Respondent’s Brief, p. 6. The only question is whether it can establish an exclusion for non-business income, and, therefore, allocate all of the income from its Trust to Mississippi for purposes of taxes. *See Dow Chemical Co. v. Dir. of Revenue*, 787 S.W.2d 276, 278 (Mo. banc 1990) (noting that non-business income is treated as an exclusion for purposes of apportioning income for tax purposes); *see also Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 787 (1992) (holding that the company must prove the exclusion). Minact, however, cannot avoid the apportionment of its Trust income in this case, along with the payment of taxes in Missouri.

A. Attracting and Retaining Key Employees is a Current “Operational” Purpose.

According to Minact, its Trust “served a long-term investment function with no impact on Minact’s current business operations.” Respondent’s Brief, pp. 16-17. This is not true with respect to current business operations, and demonstrates the error in reasoning by Minact and the Administrative Hearing Commission. Minact’s Trust, in fact, serves a current operational purpose – to attract and retain key employees. This purpose was acknowledged by Minact’s corporate representative, (Devore Depo. 18:1-3),

and in its brief. *See* Respondent’s Brief, p. 13 (conceding that the purpose of the Trust is to “attract quality employees”).

In case after case, the courts have made an important distinction for purposes of apportionable income – is the transaction operational or merely a passive investment? Indeed, the proper test is whether the “capital transaction serve[s] an operational rather than an investment function.” *Allied-Signal*, 504 U.S. at 787. Here, Minact disavows any notion that the Trust provides an investment function. After all, according to Minact none of the Trust, including any income, will ever come back to Minact. Instead, its sole purpose is to fund a plan for key employees, and more specifically to attract and retain key employees. This purpose is both significant and a current operational purpose.

As set forth in the Director’s opening brief, (and, not surprisingly, never disputed by Minact) the ability to attract and retain key employees is an important business purpose. *See, e.g., Estate of True v. C.I.R.*, 2001 WL 761280, 26 (U.S. Tax Ct. 2001); *Grant-Jacoby, Inc. v. Comm’r of Internal Revenue*, 73 T.C. 700, 715 (U.S. Tax Ct. 1980). Minact does not dispute this point, nor that its Trust is actually used to attract and retain key employees. According to Minact’s Executive Vice President for Operations, Minact created its Plan and the Trust specifically “to attract and reward qualified staff [‘basically senior staff’].” (Devore Depo. 18:1-3). Minact wanted “to be

able to recruit them from other companies.” (Devore Depo. 18:8-11; *see also id.* 23:17-20 noting that management believed the Plan and Trust would be “helpful in terms of attracting or retaining employees”). This was the “primary motivation” for creating the Plan and Trust. (Devore Depo. 18:4-5). And when asked if offering the Plan and Trust was “successful for that purpose,” Minact’s Executive Vice President for Operations stated “Yes, I do.” (Devore Depo. 23:21-23).

Moreover, one of the employees that Minact is currently seeking to attract or retain by its Trust income (*i.e.*, a key employee) is in Missouri (and presumably will receive benefits in Missouri). *See* Respondent’s Brief, p. 3. This is a current operational purpose for the Trust if ever there was one. The Trust is certainly not a passive investment or a long-term investment that is simply going to be repatriated to Minact at some future time and for some indistinct, bottom-line increasing purpose.

**B. The Authorities That Have Considered Whether
Rabbi Trust Income is Business Income Agree with
the Director.**

Not only is it clear that the business income in this case is for current operational purposes, but the only authorities to actually consider whether rabbi trust income is business income agree with the Director. Minact attempts to distinguish the preeminent state tax scholars and the Virginia

Tax Commission, but its attempts fail. Indeed, Minact even appears to concede that rabbi trust income may be subject to apportionment; stating, that if a trust is revocable “it becomes more like the *Hoechst* case,” which apportioned income. Respondent’s Brief, p. 28.

Hoechst concluded that the trust income was business income subject to apportionment for purposes of taxes. One of the key points in the *Hoechst* decision – a point that was simply ignored by Minact – is that the trust income provided a current operational business purpose:

Hoechst created the income-producing property—the pension plan and trust—in order to retain its current employees and to attract new employees.

* * *

Because the pension plan assets contributed materially to Hoechst’s *production of business income via their effect on Hoechst’s labor force*, the “acquisition, management and disposition of” these assets “constitute integral parts of” Hoechst’s “business operations.”

Hoechst Celanese Corp. v. Franchise Tax Bd., 106 Cal.Rptr.2d 548, 536 (2001) (emphasis added).

The best that Minact can say about the Virginia Tax Commission’s decision that rabbi trust income is business income is that the Virginia Tax Commission did not provide a lengthy analysis for its conclusion. Minact surmises from this that it is an unworthy authority. But, if there was truly a shortened analysis, it is more likely evidence that the conclusion reached by the Virginia Tax Commission is uncontroversial because rabbi trust income is universally used to attract and retrain key employees – a current operational business purpose and not a passive investment. Why else would the preeminent tax scholars so readily agree with the Virginia Tax Commission and its “reasons,” and reject the Administrative Hearing Commission in this case? *See* HELLERSTEIN & HELLERSTEIN, *State Taxation*, ¶9.13[1][b], S9-21 (3d Ed., 2013 Cum. Supp.) (“[I]n our view, the case for apportionment among all the states in which the taxpayer does business rather than allocation to the taxpayer’s commercial domicile seems more persuasive for the reasons stated by the Virginia Tax Commissioner.”).

Time and time again, Minact returns to the same point – that there is an “important distinction between a capital transaction that serves an investment function and one that serves an operational function.” *Allied-Signal*, 504 U.S. at 788 (citing *ASARCO, Inc. v. Idaho State Tax Comm’n*, 458 U.S. 307, 326 (1982)). Of course this point is true, and the Director embraces it. But it does not serve Minact’s purpose in this case. The investments in

Allied-Signal and *ASARCO* were simply to increase the bottom-line, and therefore were purely an investment function. The transaction in this case is fundamentally different. It was made to attract and retain key employees, which is a current operational purpose.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Director's opening brief, the Administrative Hearing Commission's decision should be reversed and Minact's income in its rabbi trust should be apportioned in Missouri, for purposes of taxes, just as the Director concluded.

Respectfully submitted,

CHRIS KOSTER
Attorney General

By: /s/ Jeremiah J. Morgan
JEREMIAH J. MORGAN
Mo. Bar No. 50387
Deputy Solicitor General
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-1800
(573) 751-0774 (Facsimile)
Jeremiah.Morgan@ago.mo.gov

ATTORNEYS FOR APPELLANT
DIRECTOR OF REVENUE

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on October 10, 2013, to:

James W. Erwin
Janette M. Lohman
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
jerwin@thompsoncoburn.com
jlohman@thompsoncoburn.com

Attorney for Respondents

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 1,299 words.

/s/ Jeremiah J. Morgan
Deputy Solicitor General